Supreme Court, U.S.
FILED
SEP 2 1992
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No. 92-209

In The

Supreme Court of the United States

October Term, 1992

MICHAEL STEEN,

Petitioner,

v.

JERRI LYNN THOMPSON, etc. and
JOSEPH DESHETRES,

Respondents.

**Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

BRIEF OF AMICI CURIAE SONOMA COUNTY, CALIFORNIA AND THE CITY OF OXNARD, CALIFORNIA, IN SUPPORT OF PETITIONER MICHAEL STEEN

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTRODUCTION 1

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI 1

RELEVANT FACTS 2

RELEVANT LAW – QUALIFIED IMMUNITY 5

RELEVANT LAW – FOURTH AMENDMENT 7

APPLICATION OF RELEVANT LAW TO THE FACTS OF THE CASE 9

CONCLUSION 12

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Creighton, 483 U.S. 635, 640 (1987)..... 5

Auriemma v. Rice, 910 F.2d 1449, 1455 (7th Cir. 1990)..... 7

Barts v. Joyner, 865 F.2d 1187, 1194 (11th Cir.) *cert. denied*, 110 S. Ct. 101 (1989) 6

Benson v. Allphin, 786 F.2d 268, 276 (7th Cir.), *cert. denied*, 479 U.S. 848 (1986)..... 5

Dartland v. Metropolitan Dade County, 866 F.2d 1321, 1323 (11th Cir. 1989)..... 6

Ker v. California, 374 U.S. 23 (1963)..... 4

Lum v. Jensen, 876 F.2d 1385, 1387 (9th Cir. 1989)..... 11

Malley v. Briggs, 475 U.S. 335, 341 (1986).....5, 10

Melton v. City of Oklahoma City, 879 F.2d 706, 729 (10th Cir. 1989)..... 5

Muhammad v. Wainright, 839 F.2d 1422, 1424 (11th Cir. 1987) 7

Noyola v. Texas Dep't of Human Resources, 846 F.2d 1021, 1025 (5th Cir. 1988)..... 6

O'Connor v. Chicago Transit Authority, 778 F. Supp. 967, 974 (N.D. Ill. 1991) 6

Rakovich v. Wade, 850 F.2d 1180, 1213 (7th Cir. 1987)(en banc), *cert. denied*, 488 U.S. 968 (1988) 6

Savidge v. Fincannon, 836 F.2d 898, 910 (5th Cir. 1988)..... 11

TABLE OF AUTHORITIES – Continued

Page

United States v. Bruss, 309 F. Supp. 915, 921 (E.D. Pa. 1969) 9

United States v. Gaines, 726 F. Supp. 1457, 1467 (E.D. Pa. 1989) *aff'd without opinion*, 902 F.2d 1562, 1563 (3d Cir.), *cert. denied*, 111 S. Ct. 128 (1990) 9

United States v. Lindsey, 877 F.2d 777, 780 (9th Cir. 1989) 4

United States v. Manfredi, 722 F.2d 519, 524 (9th Cir. 1983) 8

United States v. McConney, 728 F.2d 1195, 1205 (9th Cir. 1984)(en banc) 7, 8, 10

United States v. Nolan, 718 F.2d 589, 600 (3d Cir. 1983) 8

United States v. Parias, 805 F.2d 1447, 1457 (11th Cir. 1986), *cert. denied*, 482 U.S. 916 (1987) 9

United States v. Ramirez, 770 F.2d 1458, 1460 (9th Cir. 1985) 8

United States v. Scott, 520 F.2d 697, 700-01 (9th Cir. 1975), *cert. denied*, 423 U.S. 1056 (1976) 4

United States v. Singer, 943 F.2d 758, 762-63 (7th Cir. 1991) 8

United States v. Spinelli, 848 F.2d 26, 28 (2d Cir. 1988) 9

United States v. Streeter, 907 F.2d 781, 789 (8th Cir. 1990) 9

United States v. Turner, 926 F.2d 883, 886 (9th Cir. 1991) 8

TABLE OF AUTHORITIES – Continued

Page

STATUTES AND RULES

United States Constitution, Fourth Amendment.....4, 8

18 United States Code § 3109.....9

United States Supreme Court, Rule 10.1. (a).....1

United States Supreme Court, Rule 37.2.....1

United States Supreme Court, Rule 37.5.....1

California Penal Code § 1531.....4

INTRODUCTION

Amici Curiae, the County of Sonoma, California and the City of Oxnard, California (hereinafter "Amici"), submit this brief in support of the Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit (hereinafter the "Petition") filed on August 4, 1992 by Petitioner, Michael Steen ("Sergeant Steen"). Amici submit this brief pursuant to Rules 37.2. and 37.5. of this Court.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

Amici urge the Court to grant the Petition pursuant to that part of Rule 10.1.(a) of this Court which states, as one of the special and important reasons for granting a petition for a writ of certiorari, that a United States Court of Appeals "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision."

As set forth at greater length *infra*, the decision of the United States Court of Appeals for the Ninth Circuit, in upholding the denial of qualified immunity to Sergeant Steen, has completely departed from settled standards governing the entitlement of public officials to the shield of qualified immunity. Moreover, it has done so in a context which places particular public officials, law enforcement officers, in the position of having to risk their personal safety in order to avoid forfeiting their

qualified immunity if they engage in split-second decisions as to which a court, in the bright gleam of hindsight, may opine that the circumstances were not sufficiently exigent.

For the reasons set forth below, both the District Court and the Court of Appeals not only denied qualified immunity to Sergeant Steen in the absence of established law which permitted the conclusion that his conduct was unlawful, but they disregarded established law that demonstrates the lawfulness of his conduct. In so doing, both the District Court and the Court of Appeals so far departed from established law in regard to the rule of qualified immunity as to require the exercise of this Court's supervisory intervention.

RELEVANT FACTS

Sergeant Steen, acting pursuant to a warrant authorizing the entry into and search of a house occupied by plaintiff Deshetres, made the decision to enter the house on March 17, 1987, between 7 and 10 seconds after another officer had knocked on the door of the house and twice announced the police presence and purpose. Sergeant Steen made that decision on the basis of the following facts: (1) the presence of the police had been prematurely discovered by an associate of Deshetres, who, upon seeing the police while en route away from the house, returned to it; (2) Deshetres was known to be a member of a motorcycle gang with a reputation for drugs and violence; (3) Deshetres was known to have an arrest record for various weapons and drug charges, including

one for robbery; and (4) Deshetres had, on a prior occasion, been arrested while reaching for a handgun.

The District Court acknowledged that "police officers are not required to comply with the knock-notice requirement when there are reasonable grounds to believe that compliance would endanger the officers." (App. 50). The District Court also acknowledged that "the facts support a reasonable belief that Deshetres would be inside the house when defendants served the search warrant on the morning of March 17, 1987." (App. 51). The District Court further acknowledged that "the facts support a reasonable belief that plaintiffs received some warning, albeit a brief one, that police were approaching their residence." (App. 52). Most important, the District Court found that "the facts support a reasonable belief that Sergeant Steen's team would be met with armed resistance." (App. 52). However, notwithstanding these acknowledged facts, which demonstrate the clear existence of exigent circumstances, the District Court concluded that Sergeant Steen was not entitled to qualified immunity, stating that, despite all these facts, as well as the fact that "Deshetres was given some warning of the police's approach," they "d[id] not excuse [Sergeant Steen's] failure to comply with the knock-notice rule."[1] (App. 53).

The Court of Appeals panel, consisting of Circuit Judges Schroeder, Reinhardt and Kleinfeld, affirmed the

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[1] These statements were made in an Order filed by the District Court on Feb. 9, 1990, the contents of which were incorporated by reference in the District Court's Order of Dec. 27, 1990, which denied Sergeant Steen's request for qualified immunity. (App. 15-16).

District Court's conclusion, without noting that it was based solely on State Court rulings construing California Penal Code § 1531.[2] The panel cited no federal decisions itself in support of that conclusion. Indeed, the only relevant federal decisions cited in the Court of Appeals' opinion were two cases which pointed in the *opposite* direction, i.e., *United States v. Lindsey*, 877 F.2d 777, 780 (9th Cir. 1989), which the panel cited for the proposition that "[e]xigent circumstances are those 'that would cause a reasonable person to believe that entry was necessary to prevent physical harm to the officers or other persons' " and *United States v. Scott*, 520 F.2d 697, 700-01 (9th Cir. 1975), *cert. denied*, 423 U.S. 1056 (1976), which the panel cited for the proposition that "[e]xigent circumstances also exist where . . . occupants are armed and intend to resist violently." (App. 3).

In stating its reasons for upholding the District Court's conclusion that no exigent circumstances existed which excused Sergeant Steen's failure to comply with the knock-notice requirement, the Court of Appeals entirely disregarded the factual acknowledgements of the District Court, as set forth *supra*. Instead, it treated the District Court's *conclusion* as "factual findings, which are not clearly erroneous" and opined that its "conclusion is sound." (App. 4).

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[2] The only federal decision cited in the District Court's analysis of the knock-notice entry requirement was *Ker v. California*, 374 U.S. 23 (1963), which it cited for the proposition that "[k]nock-notice rights are protected under the Fourth Amendment." (App. 46). The District Court seems to have assumed that the State court decisions it cited simply replicated the requirements of the fourth amendment.

RELEVANT LAW – QUALIFIED IMMUNITY

In *Malley v. Briggs*, 475 U.S. 335, 341 (1986), this Court emphasized the breadth of the protection afforded public officials by the rule of qualified immunity, stating that it affords "ample protection to all but the plainly incompetent or those who knowingly violate the law" and that it can be denied only when "on an objective basis, it is obvious that no reasonably competent officer would have concluded that [his conduct was in accord with clearly established law]; but if officers of reasonable competence could disagree on this issue, immunity should be recognized."

In *Anderson v. Creighton*, 483 U.S. 635, 640 (1987), this Court established that before a defendant can be denied qualified immunity on a claim of violating a plaintiff's right, "the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right."

Although this Court has not yet addressed the concept, the courts which have addressed it have all recognized that when a claim "involv[es] the balancing of competing interests, for which the standard may be clearly established, but its application is so fact dependent that the law can rarely be considered 'clearly established,' " "the facts of the existing case law must closely correspond with the contested action before the defendant official is subject to liability under the *Harlow* [test]." *Benson v. Allphin*, 786 F.2d 268, 276 (7th Cir.), *cert. denied*, 479 U.S. 848 (1986). *See Melton v. City of Oklahoma City*, 879 F.2d 706, 729 (10th Cir. 1989) ("because a rule of law

determined by a balancing of interests is inevitably difficult to clearly anticipate, it follows that where *Pickering* balancing is required, the law is less likely to be well established than in other cases"); *Dartland v. Metropolitan Dade County*, 866 F.2d 1321, 1323 (11th Cir. 1989) ("Because no bright-line standard puts the reasonable public employer on notice of a constitutional violation, the employer is entitled to immunity except in the extraordinary case where *Pickering* balancing would lead to the inevitable conclusion that the discharge of the employee was unlawful"); *Noyola v. Texas Dep't of Human Resources*, 846 F.2d 1021, 1025 (5th Cir. 1988)("One consequence of case-by-case balancing is its implication for the qualified immunity of public officials whose actions are alleged to have violated an employee's first amendment rights. There will rarely be a basis for *a priori* judgment that the termination or discipline of a public employee violated 'clearly established' constitutional rights"); *Rakovich v. Wade*, 850 F.2d 1180, 1213 (7th Cir. 1987)(en banc), *cert. denied*, 488 U.S. 968 (1988)("It cannot be said that an imperfect balancing resulting, on hindsight, in a decision on the wrong side of the scales shows plain incompetence or total disregard, unless, of course, the proper balance was clearly illuminated by the light of existing law"); *O'Connor v. Chicago Transit Authority*, 778 F. Supp. 967, 974 (N.D. Ill. 1991)("Balancing tests, by their nature, make for difficult predictions regarding the outcome of all but the most obvious cases").

It is essential, therefore, to avoid abstractions in the determination of claims of qualified immunity, in favor of "studying how these abstractions have been applied in concrete circumstances." *Barts v. Joyner*, 865 F.2d 1187,

1194 (11th Cir.) *cert. denied*, 110 S. Ct. 101 (1989). *See also Auriemma v. Rice*, 910 F.2d 1449, 1455 (7th Cir. 1990)("The test for [qualified] immunity is whether the law is clear in relation to the specific facts confronting the public official when he acted"); *Muhammad v. Wainright*, 839 F.2d 1422, 1424 (11th Cir. 1987)("General propositions have little to do with the concept of qualified immunity").

RELEVANT LAW – FOURTH AMENDMENT

The Court of Appeals in this case not only failed to cite any relevant authority which supported the District Court's conclusion; it also failed to acknowledge prior Ninth Circuit decisions which are highly relevant to the facts of this case and which demonstrate the lawfulness of Sergeant Steen's conduct.

In *United States v. McConney*, 728 F.2d 1195, 1205 (9th Cir. 1984)(en banc), the court recognized that the issue of exigent circumstances presents a mixed question of law and fact which requires the balancing of competing interests, and in which one side of the balance concerns the safety of law enforcement officers and the degree of risk they can reasonably be expected to assume in exercising their discretionary authority in carrying out their vital law enforcement duties. The court expressed that principle as follows:

> The mixed question of exigency is rooted in constitutional principles and policies. Like many such mixed questions, its resolution requires us to consider abstract legal doctrines, to weigh underlying policy considerations, and to balance competing legal interests. In particular, its

> resolution requires that we strike a balance between two sometimes conflicting societal values – the safety of law enforcement officers and fourth amendment privacy interests. The essential and difficult question raised by this balancing is how much risk police officers can reasonably be expected to assume before disregarding the rules society has adopted to otherwise circumscribe the exercise of their considerable discretionary authority in carrying out their vital law enforcement duties. (*Id.*, footnotes omitted).

The Ninth Circuit has stated the principle that "a police officer's 'reasonable belief that announcement might place him or his associates in physical peril . . . justifies non-compliance with the announcement provisions of [18 U.S.C. § 3109].' "[3] *United States v. Manfredi*, 722 F.2d 519, 524 (9th Cir. 1983). *Accord, United States v. Turner*, 926 F.2d 883, 886 (9th Cir. 1991); *United States v. Ramirez*, 770 F.2d 1458, 1460 (9th Cir. 1985).

The courts in other circuits have enunciated the same principle. *See*, e.g., *United States v. Singer*, 943 F.2d 758, 762-63 (7th Cir. 1991)(gun reputedly in occupant's possession "posed a quantifiable risk to the safety of the officer executing the warrant" and constituted an "exigent circumstance [which] permitted the police to enter [the

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[3] In *United States v. McConney, supra*, 728 F.2d at 1205 n.12, the court stated that "[t]here is no dispute that the requirements of § 3109 are rooted in constitutional values." *But see United States v. Nolan*, 718 F.2d 589, 600 (3d Cir. 1983), pointing out that this Court has not definitively determined the relationship between § 3109 and the fourth amendment, and concluding that their origin and purposes, while similar, are not identical.

occupant's] home without first knocking and announcing their presence"); *United States v. Spinelli*, 848 F.2d 26, 28 (2d Cir. 1988)(reasonable belief that occupant was armed and had a reputation for violence constituted an exigent circumstance justifying non-compliance with section 3109); *United States v. Parias*, 805 F.2d 1447, 1457 (11th Cir. 1986), *cert. denied*, 482 U.S. 916 (1987)("an officer's reasonable belief that such announcement [of the police presence and purpose before entering] might imperil himself or other officers excuses non-compliance with [section 3109]"); *United States v. Gaines*, 726 F. Supp. 1457, 1467 (E.D. Pa. 1989), *aff'd without opinion*, 902 F.2d 1562, 1563 (3d Cir.), *cert. denied*, 111 S. Ct. 128 (1990) ("compliance with section 3109 is excused when the officer has a reasonable belief that it might endanger him or his associates"); *United States v. Bruss*, 309 F. Supp. 915, 921 (E.D. Pa. 1969) ("where an announcement of identity and purpose may result in bodily harm or peril to the arresting officers, failure to make such announcement upon entry may be justified and excused").

APPLICATION OF RELEVANT LAW TO THE FACTS OF THE CASE

As the court recognized in *United States v. Streeter*, 907 F.2d 781, 789 (8th Cir. 1990), "[t]here cannot be a hard and fast time limit under 18 U.S.C. § 3109, given the myriad of potential circumstances that could confront an officer serving a warrant." At the same time, however, there is virtual, if not complete, unanimity of view that where, as the District Court acknowledged in this case, "the facts support a reasonable belief that Sergeant

Steen's team would be met with armed resistance" (App. 52), exigent circumstances exist which excuse compliance with the requirement that an officer knock, give notice and afford the occupant(s) of a premises the opportunity to permit peaceful entry.

Even if the facts were closer than they are, Sergeant Steen would be clearly entitled to qualified immunity because of the breadth of the protection afforded public officials by the rule of qualified immunity, such that only a "plainly incompetent" official, or one intent on "knowingly violat[ing] the law[,]" *Malley v. Briggs, supra,* 475 U.S. at 341, forfeits that protection. This is especially so in cases where the constitutional right involved is subject to a balancing test, and even more especially so when that balancing test concerns, as here, consideration of "the safety of law enforcement officers . . . . " *United States v. McConney, supra,* 728 F.2d at 1205.

The fact that, under the undisputed circumstances acknowledged by the District Court, Sergeant Steen's action was not merely arguably lawful, but was clearly and unmistakably lawful, demonstrates that the District Court's conclusory assertion that there were not sufficiently exigent circumstances even to warrant the granting of qualified immunity to Sergeant Steen, was plain error as a matter of law.

In turn, the Ninth Circuit panel in this case upheld the District Court's denial of qualified immunity, without citing even a *single* decision based on factually analogous circumstances holding conduct such as that of Sergeant Steen to be unlawful, let alone a line of authority arguably deserving the appellation of "clearly established

law"[4] so holding. The panel's decision cannot be reasonably accounted for by any hypothesis other than that it disregards the clear guidance of this Court in the law of qualified immunity. This phenomenon, which is one that is not without precedent in the Ninth Circuit Court of Appeals (e.g., the recent effort to delay imposition of the death penalty), is one that requires the supervisory intervention of, and correction by, this Court.

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[4] The term "clearly established" has not been definitively defined in this context by this Court. There is dictum in *Lum v. Jensen*, 876 F.2d 1385, 1387 (9th Cir. 1989), that "binding precedent in this circuit" would constitute "clearly established law even if the law in other circuits were contrary." However, this approach is not satisfactory because it could result in disparate conclusions as to persons in different circuits whose conduct cannot be differentiated and as to which the same law *should* be applied. A preferable formulation as to what constitutes "clearly established law" in the context of qualified immunity is Judge Gee's partial concurrence and dissent in *Savidge v. Fincannon*, 836 F.2d 898, 910 (5th Cir. 1988)("the meaning of 'clearly established' is not yet clearly established; but the ring of the whole phrase – 'clearly established . . . rights of which a reasonable person would have known' – imports to me legal rights so clearly settled and defined that knowledge of their existence is a commonplace among the educated and failure to recognize them implies their wilful disregard"). In this case, as demonstrated *supra*, there is no need to wrestle with this issue.

CONCLUSION

For the reasons stated above, Amici, the County of Sonoma California, and the City of Oxnard, California, respectfully urge the Court to grant the Petition for a Writ of Certiorari in this case.

Dated: September 1, 1992.

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